No. 89-1049

In The

# Supreme Court of the United States

October Term, 1989

JANET M. DANESE, Individually and as Personal Representative of THE ESTATE OF DAVID DANESE, Deceased; LOUIS DANESE, SR., DANIEL DANESE, PAMELA DANESE, MARGARET DANESE, THOMAS DANESE, FRANCES DANESE, and LOUIS DANESE, Individually,

*Petitioners,*

v

THOMAS A. ASMAN, Individually and as Chief of Police of the City of Roseville; ROBERT PETERS, Individually and as Inspector for the City of Roseville; HOWARD HILL and FREDERICK STEIN, Individually and as Sergeants and Shift Commanders for the City of Roseville; STEVEN GOWSOSKI, ROBERT CHUCHRAN, DENNIS CARDINAL and RICHARD KENYON, Individually and as Police Officers of the City of Roseville,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS GOWSOSKI, CHUCHRAN, CARDINAL & KENYON'S

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

RESPONDENTS OBJECT TO PETITIONERS' STATEMENT OF QUESTIONS PRESENTED. THE QUESTIONS DO NOT FAIRLY STATE THE ISSUES BEFORE THIS COURT, ARE ARGUMENTATIVE AND ASSUME FACTS THAT ARE NOT SUPPORTED BY THE RECORD. THE STATEMENTS THAT DANESE WAS "OBVIOUSLY SUICIDAL" AND "HAD THREATENED TO COMMIT SUICIDE" ARE CONCLUSIONS NOT SUPPORTED BY ANYTHING IN THE RECORD. IT WAS FAR FROM OBVIOUS THAT DANESE HAD SUICIDAL INCLINATIONS, AND THERE WERE NO UNEQUIVOCAL THREATS TO COMMIT SUICIDE. THE STATEMENT OF QUESTIONS PRESENTED ASSUMES A FACTUAL SITUATION THAT DID NOT EXIST IN THIS CASE.

THE ONLY ISSUE PRESENTED IN THIS CASE IS WHETHER POLICE OFFICIALS IN A LOCAL LOCKUP HAVE A DUTY TO RECOGNIZE NON-OBVIOUS CUES THAT A PRETRIAL DETAINEE, ARRESTED FOR DRUNK DRIVING, MAY BE CONTEMPLATING SUICIDE AND THEN TAKE ADEQUATE MEASURES TO PREVENT THE SUICIDE.

## PARTIES

Respondents Steven Gowsoski, Robert Chuchran, Dennis Cardinal, Richard Kenyon are individual police officers employed by the City of Roseville. None of these officers hold supervisory rank. All were found by the Sixth Circuit Court of Appeals to be entitled to qualified immunity.

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### STATEMENT OF THE CASE

Respondents accept the statement of the case as set forth in the Brief in Opposition to Petition for Writ of Certiorari submitted by Respondents ASMAN, PETERS, HILL and STEIN.

## REASONS FOR DENYING THE WRIT

*(Respondents adopt all of the arguments made on behalf of Respondents ASMAN, PETERS, HILL and STEIN in their Brief in Opposition to Petition for Writ of Certiorari.)*

### PREFACE

Petitioners claim, as a matter of Federal Constitutional Law, that Roseville Police Officers had a duty to recognize that DAVID DANESE was contemplating suicide and to either place DANESE under constant surveillance or provide him with immediate psychological treatment. Petitioners make a number of particularized allegations relating to the presence or absence of surveillance cameras, whether DANESE was placed in a detoxification cell, and etc. However, when stripped to their essentials, Petitioners' claim reduces to the formulation just stated: the officers had a duty to diagnose DANESE's suicidal intentions and place him under constant observation, so that he could not carry out those intentions.

There are essentially two issues that control the disposition of this case. First, whether there is any Constitutional right, at all, that was violated by any of the officers. Second, whether the officers are entitled to qualified immunity, assuming that there is such a Constitutional right.

### I.

### EXISTENCE OF CONSTITUTIONAL RIGHT

#### A. There Is No Substantive Duty To Screen A Pretrial Detainee For Suicidal Tendencies And The Police Officers Were Not Deliberately Indifferent To Danese's Medical Needs.

This Court has never explicitly held that pretrial detainees have a right to be screened for suicidal ten-

dencies and to be placed under constant observation, so that they cannot carry out their suicidal intentions. When this Court's recent precedents in this area are analyzed, it is clear that there is no such Constitutional right. The only substantive duty requires police officers not to be deliberately indifferent to the obvious medical needs of a detainee. DANESE made no unequivocal threat to commit suicide and his conduct, taken as a whole, would have permitted a reasonable police officer to determine that DANESE was not a substantial suicide risk. Since there was no evidence of deliberate indifference shown, Petitioners have failed to come forth with facts sufficient to support a claim of violation of a Constitutionally protected right.

There are three decisions of this Court which define the Constitutional issues involved in this case. The first of these cases is *Bell* v. *Wolfish*, 441 U.S. 520; 99 S.Ct. 1861; 60 L.Ed. 2d. 447 (1979). This case determined that, as a matter of substantive due process, pretrial detainees have a 5th Amendment right to be free of any punishment inflicted by prison officials. Essentially, this Court held that while prison officials may place restraints on the liberty of criminal suspects awaiting trial, each of these restraints must bear a reasonable relationship to either maintaining the security of the facility or preventing the escape of the detainees. While this case did not deal with medical treatment issues, the "no punishment" rule becomes extremely significant in light of a later decision by this Court.

The next significant case is *Estelle* v. *Gamble*, 429 U.S. 97; 97 S.Ct. 285; 50 L.Ed. 2d. 251 (1976). This case involved the medical treatment rights of a convicted criminal being held in a state correctional facility. This Court held that the 14th Amendment substantive due

process clause guaranteed that a convict had a right, derived from the 8th Amendment, to be free from "cruel and unusual punishment." "Deliberate indifference" to the medical needs of a prisoner would be considered cruel and unusual punishment.

The final case is *Youngberg* v. *Romeo*, 457 U.S. 307; 102 S.Ct. 2452; 73 L.Ed. 2d. 28 (1982). This Court held that a mentally retarded adult involuntarily committed to a state institution has a due process right to receive adequate medical care and treatment. Essentially, the Court held that the persons in charge of the institution must exercise professional judgment to determine what care, if any, is required.[1]

The Court appears to have adopted a continuum of rights. Those persons involuntarily committed because of illness or handicap are entitled to the most rights. Next on the continuum, come the rights of pretrial detainees who have not yet been adjudicated guilty of a crime. At the extreme end of the continuum are convicted criminals who may be punished provided the punishment is not cruel and unusual. However, in the context of screening for and preventing suicide, the substantive Constitutional tests all equate to the "deliberate indifference" standard which was correctly applied by the 6th Circuit Court of Appeals in this case.

Although, in general, the rights of pretrial detainees are greater than convicted criminals, in the context of providing adequate medical, including psychological, care, the Constitutional standards are identical. In *Estelle* v. *Gamble*, this Court held that developing

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[1] The case actually dealt with training, but all parties agreed that the State had a duty to provide medical care, and the Court so held.

standards of decency absolutely prohibited the withholding of medical care as punishment for a crime. Thus, it violates the 8th Amendment rights of convicts if the State is deliberately indifferent to their obvious medical needs.

A convict's right to be free from punishment through deliberate indifference to his medical needs is exactly equivalent to the right of pretrial detainees to be free of any punishment whatsoever. In either case, a State is absolutely prohibited from using denial of adequate medical care as punishment. In this context, the 8th Amendment right of convicts to be free of "cruel and unusual punishment" is identical to the 14th Amendment rights of pretrial detainees to be free of "punishment." Neither can be punished by denying medical care. It necessarily follows that the "deliberate indifference" standard of *Estelle* v. *Gamble* must apply equally to pretrial detainees.

Although this Court explicitly rejected an 8th Amendment analysis of the right to training of an involuntarily committed mentally retarded patient in *Youngberg* v. *Romeo*, this Court's analysis would reach the same result as the deliberate indifference standard if applied to the facts of this case. This Court rejected the argument that a State only has a burden not to be deliberately indifferent to the medical needs of involuntarily committed patients. The Court held, as a matter of substantive due process, that a State must provide minimal training necessary to insure the safety and freedom from bodily restraint of the patient. This requires that personnel at the institution exercise professional judgment as to the type of training needed.

However, this is just the first step in the analysis. The second step is determining the standards for breach of professional duty. This Court explicitly rejected a

negligence or medical malpractice standard. The Court, instead, held that liability may not be imposed unless the professional in charge of the institution did not base treatment decisions upon professional judgment, but, instead, relied on some extraneous considerations.

The first part of the test, if applied to pretrial detainees, would require jail officials to provide minimally adequate medical treatment to detainees. However, unlike involuntarily committed individuals who obviously require medical attention, since that is the basic reason for their commitment, pretrial detainees cannot be presumed to need any particular type of medical or psychological services. Someone would have to make a discretionary decision as to whether treatment was, in fact, necessary. That would invoke the second part of the test, which would require prison or jail officials to exercise professional discretion to determine whether psychological counseling, monitoring or medical treatment is necessary. As long as professional judgment is, in fact, exercised, jail officials would not be liable even if their actions were negligent.

It is submitted that this is no different than the "deliberate indifference" standard applied in *Estelle* v. *Gamble*. Unless *Youngberg* v. *Romeo* is read as requiring that all pretrial detainees be given a physical and psychological examination by licensed professionals at the point of arrest, and no court has ever held this, the initial decision as to whether medical or psychological treatment is necessary must be made by either the arresting officers or the person in charge of the lockup. This person, necessarily, would be a lay person, probably a police officer. That police officer would have to make a discretionary decision as to whether the detainee appeared to need medical or psychological attention. *Youngberg* v. *Romeo* would

only require that officer to exercise professional discretion, and the officer would not be liable even if his decision was negligent or otherwise breached professional standards. If the officer failed to exercise professional judgment, this would simply be another way of saying that the officer was deliberately indifferent to the medical needs of the detainee.

There is absolutely nothing in the record to indicate that any of the four individual police officers did anything which exhibited deliberate indifference to the possibility that DANESE might attempt suicide.

The police reports[2] do not indicate that DANESE was ill, injured, in pain or otherwise in distress. DANESE was apparently familiar with jails and booking procedures as he joked with another, less-experienced arrestee about the officers taking away his belt and shoelaces. DANESE indicated to the other detainee that these items were taken away to prevent suicide. DANESE objected to OFFICER GOWSOSKI taking away his boots and specifically stated that he couldn't kill himself with the boots, because they didn't have laces, and "I'm not going to do that anyway."

DANESE was given a breath test which established his blood alcohol level at 0.13%. This was high enough to give rise to a rebuttable presumption, under Michigan law, that his ability to operate a motor vehicle on the highways of the State was materially and substantially impaired.[3] However, DANESE appeared to be

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[2] The police reports are set forth, in full, in the Brief in Opposition to Petition for Writ of Certiorari filed on behalf of Respondents ASMAN, PETERS, HILL and STEIN at pp 2-9. All facts are gleaned from those reports which were submitted by Petitioners and which are not contradicted by any sworn testimony.

[3] Prior to 1967, though, DANESE would not even have been presumed under the influence. M.C.L. 257.625a(1)(b) read:

(*concluded on page 8*)

rational, oriented and able to take care of himself. He was able to make two phone calls, apparently to his parents, to make arrangements to have his car released from the police impound lot. There is nothing in the record to indicate that DANESE was going through alcohol withdrawal or that he needed medical detoxification.

DANESE did indicate that he was concerned about being $13,000.00 in debt and that "he wished he was not here."

Despite this, all of the officers noted that DANESE appeared to be "jovial" and in "good spirits."

Petitioner relies on so-called suicide profiles[4] which would indicate that a young, white male, arrested for a minor offense, who indicates signs of depression and has been using drugs or alcohol presents a high risk of suicide for which special precautions should have been taken. This so-called profile, however, describes almost every prisoner who is arrested for drunk driving. The published literature, moreover, indicates that such profiles are almost totally useless.

One such study is Beck, et al., "Hopelessness and Eventual Suicide: A Ten-Year Prospective Study of Patients Hospitalized With Suicidal Ideation," *American*

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(*continued from page 7*)

> "(b) If there was at that time in excess of 0.05% but less than 0.15% by weight of alcohol in the defendant's blood, such fact shall not give rise to any presumption that the defendant was or was not under the influence of intoxicating liquor, but such fact may be considered with other competent evidence in determining the guilt or innocence of the defendant,"

[4] See, for example, paragraph 63 of the First Amended Complaint. (R: 38, p. 33.)

*Journal of Psychiatry,* 142; 5 (May, 1985). The authors studied 207 patients who were hospitalized because of suicidal ideation. The authors concluded that degree of depression had no predictive value in determining whether these patients who were already identified as suicide risks would actually attempt suicide. It was also noted that abuse of drugs and alcohol had no predictive effect. The authors concluded that the only reliable predictor of suicide was a so-called "hopelessness scale" which is an inventory administered by a clinical psychologist or psychiatrist as part of a detailed clinical interview. Even so, the researchers warn:

> "However, it should be kept in mind that the overwhelming majority of the patients with a Hopelessness Scale score over 9 did not commit suicide. Furthermore, a low Hopelessness Scale score is certainly no guarantee that a given patient will not commit suicide."

Suicide profiles were also analyzed in Kennedy, "A Theory of Suicide While in Police Custody," *Journal of Police Science and Administration,* 12; 2 (1984). Kennedy studied the widely-held belief that a potential suicide was most likely a young white male arrested for a minor crime or traffic offense and under the influence of drugs or alcohol. Kennedy concluded that there was no significant difference in suicide rates based upon age, race or reason for the arrest, and concluded, "It would appear that explanatory theories based on demographic variables would be of little use in the prediction and prevention of suicide."

Kennedy suggests that the suicidal inmate is the product of very complex sociological and psychological processes and offers no readily-applied formula for recognizing such an individual. To the contrary, Kennedy suggests that further research is needed and predicts that

a fundamental restructuring of prisons may have to occur.

Given the uncontroverted facts contained in the record[5] and given the fact that the medical profession offers little assistance in diagnosing a potential suicide, it is impossible to say that these officers exhibited a deliberate indifference to DANESE's psychological needs by not determining that he was potentially suicidal and taking effective steps to prevent his suicide. Since a Constitutional violation requires a substantial showing of deliberate indifference, the Sixth Circuit Court of Appeals was correct in dismissing the case as to the four individual officers.

### B. No Procedural Due Process Claim Was Pleaded Since Petitioners Did Not Allege Any Violation Of Procedural Rights.

Petitioners make the argument that Roseville police officials violated mandatory regulations of the Michigan Department of Corrections and that these alleged violations deprived DANESE of liberty without due process of law. Petitioners, then, apparently presume that violation of the Department of Corrections[6] regu-

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[5] Petitioners make unsupported allegations that DANESE repeatedly stated he wished he were dead and made unqualified statements that he intended to kill himself. However, no sworn testimony was presented in support of those allegations, and it appears that the police officers were the only eyewitnesses to most of the material events. These allegations should be disregarded.

[6] It is far from clear that these regulations imposed any mandatory duties on local officials. First, any of the rules could be waived by the State under very nebulous standards. 1979 A.C., R. 791.511 provided:

> "Rule 511. (1) A facility shall comply with the requirements of these rules, except that the commission may grant a variance where it determines that:

(*concluded on page 11*)

lations either gives rise to a claim for damages or defeats qualified immunity. Petitioners are not attempting to enforce procedural rights and are not asking for a hearing.

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(*continued from page 10*)

(a) Strict compliance would cause unusual difficulties and hardships.

(b) The exception meets the intent of the rule and would not seriously affect the security, supervision of inmates, programs or the safe, healthful, or efficient operation of the facility.

(2) In previously existing facilities where specific rules cannot be complied with because of unusual difficulty or undue hardship, exception to specific physical plant provisions of the rules may be made if the intent of the rules is met and the security, supervision of inmates, programs or the safe, healthful, or efficient operation of the facility is not seriously affected.

(3) When an exception to a rule is desired for a specific facility, the responsible local authority shall submit a written request to the commission stating the justification for the requested exception and documenting the claim that the exception meets the intent of the rule and will not jeopardize the security, supervision of the inmates, programs or the safe, healthful or efficient operation of the facility. An exception, if granted, shall apply only to the petitioner, for the specific situation or equipment cited and for the period of time specified."

Second, there was a great deal of controversy over whether the regulations could even be applied to local lockups. On September 21, 1982, the Michigan Court of Appeals decided the case of *Young* v. *City of Ann Arbor*, 119 Mich. App. 512, 326 N.W. 2d. 547 (1982). (The Court reconsidered its opinion at 125 Mich. App. 459, 336 N.W. 2d. 24 (1983)). It is doubtful if this case had been published at the time of DANESE's hanging. *Young* was the first appellate decision in Michigan to hold that the Department of Corrections had authority to regulate holding cells in local jails. The Michigan Supreme Court sent *Young* back to the Court of Appeals for reconsideration, 422 Mich. 901, 367 N.W. 2d. 333 (1985). The case was, then, the subject of a third opinion of the Court of Appeals, 147 Mich. App. 333, 382 N.W. 2d. 785 (1985) and the Michigan Supreme Court, with two dissents, denied leave to appeal, 425 Mich. 862 (1986).

In the meantime, the legislature settled the controversy by amending the statute to explicitly prohibit the Department of Corrections from exercising authority over local lockups. Public Acts of 1984, No. 102, M.C.L. 791.262(5).

Petitioners misunderstand or misrepresent the role of State regulations in a procedural due process context. While State laws can give rise to a liberty interest, this Court has never held that violations of those State laws can be the basis of a damage action in Federal Court.

This Court only relies upon State law to determine whether a "liberty" or "property" interest has been created. Violation of State law is entirely immaterial to this inquiry. In most of these cases, State officials have, arguably, followed State law to the letter. The real issue is whether State law provides Constitutionally adequate procedures for taking away rights that have been created by State law, not whether State law has been violated.

Whether the procedures are adequate is solely a matter of Federal Constitutional Law. If there is a Federal procedural violation, the usual remedy is remand to State officials for a hearing appropriate to the interest involved.

Damages, if awardable at all, would only be awarded for violation of Federal procedural rights. *Perry* v. *Sindermann*, 408 U.S. 593; 92 S.Ct. 2694; 22 L.Ed. 2d. 570 (1972) is a classic example. This Court held that whether or not the plaintiff had tenure and, thus, a "property" right was largely an issue of the State law of implied contracts. If State contract law provided a "legitimate claim of entitlement" to continuing employment, then the plaintiff had a "property" right.

*Perry* did not, however, take the logical jump urged by Petitioner in this case in fashioning a remedy. *Perry* did not hold, that if a property interest is found, then the Court must proceed to determine if there has been a breach of the employment contract and, if so, award money damages. Quite the contrary: the Court held

that the remedy was a hearing before college officials "where he could be informed of the grounds for his nonretention and challenge their sufficiency." 408 U.S. at 603; 92 S.Ct. at 2700.

The cases cited by Petitioners, at page 19 of their brief, are not damage cases, but involve vindication of Federal procedural rights similar to those in *Perry*.

These procedural due process cases are entirely beside the point and have nothing to do with a damage action against individual State officials. Every one of the cases cited by Petitioners involves a situation where the plaintiffs are seeking injunctive or declaratory relief-to prospectively secure benefits which they allege have been conferred upon them by State law and of which they claim to have been deprived without due process of law. The purpose in each of these cases is to compel State officials to hold a hearing which could result in bestowing some prospective benefit on the Plaintiff, such as parole or more favorable conditions of confinement. None of the cases involved money damages for past violations of State laws.

Indeed, in most of the cited cases, a damage remedy would not even have been available because of the restrictions on Federal jurisdiction contained in the 11th Amendment. While there does not appear to be an 11th Amendment issue in this case, it is important to place the cases cited by Petitioners in their proper perspective. Procedural due process cases should not be cited as precedent for a money damage remedy when money damages were not even available in many of the cases cited by Petitioners.

In *Edelman* v. *Jordan*, 415 U.S. 651; 94 S.Ct. 1347; 39 L.Ed. 2d. 662 (1974), this Court held that the 11th Amendment barred a damage remedy against State

officials, sued in their official capacities, where the damages would be paid from the State Treasury. A Federal Court could only grant prospective relief by way of an injunction and had no jurisdiction to award compensation for past violations even if couched in terms of restitution.

*Edelman* would have barred money damages in most, if not all, of the cases cited by Petitioners. For example, an actual organ of State government was the principal defendant in *Kentucky Department of Corrections* v. *Thompson*, __ U.S. __; 109 S.Ct. 1904; 104 L.Ed. 2d. 506 (1989). Money damages were not at issue in that case and damages would not have been available under *Edelman* because damages would have been payable from the State Treasury.

Another indication that the cases cited by Petitioners do not allow money damages is the fact that mootness is a defense. For example, *see Connecticut Board of Pardons* v. *Dumbschat*, 452 U.S. 458; 101 S.Ct. 2460; 69 L.Ed. 2d. 158 (1981). The Court disposed of the mootness argument, at footnote 5, by observing that other representative plaintiffs had been substituted into the action and that two of them were currently serving life sentences and would be affected by the Judgment. The fact that the Court would even consider mootness as an argument is a strong indicator that these cases are not about damages, since mootness would not be an issue if someone is mainly seeking damages for a previous injury. The thrust of these cases is to remedy procedural violations where correcting the procedure may have some continuing effect on the plaintiff's situation.

Whatever the relevance of the cited cases, they most assuredly do *not* hold that one is entitled to recover damages, in Federal Court, for violation of a State regu-

lation that may create a Constitutionally protected liberty interest.

When the issue is damages, entirely different principles apply. The primary case which directly addresses the role of State law to damages in a procedural due process context is *Davis* v. *Scherer*, 468 U.S. 183; 104 S.Ct. 3012; 82 L.Ed. 2d. 139 (1984). There are two major holdings in *Davis*, one implicit and the other, explicit.

The explicit holding of the case was that violation of a State regulation had no relevance to the inquiry of whether a State official was entitled to qualified immunity for violation of Constitutional rights. Even if there was a clear-cut violation of a mandatory regulation, this would not defeat the claim to immunity.

Implicit in this Court's decision and acknowledged at footnote 11, is the related concept that violation of the State regulation is not directly actionable under 42 U.S.C. § 1983 and has no bearing on the claim of Constitutional right. The footnote makes it clear that State law is only relevant in determining whether a "liberty" or "property" interest exists. The focus, then, shifts to determining what Federally-mandated procedures will be imposed.

In *Youngberg* v. *Romeo*, in an unnumbered footnote, Justice Berger dismissed as frivolous, an argument that a plaintiff is entitled to enforce substantive State law in a § 1983 action. Justice Berger indicated that such a result would tend to blur the distinction between State and Federal law.

Even if Roseville Police Officers violated Michigan Department of Corrections regulations, that would have no bearing on whether there was a Constitutional violation or whether the officers are entitled to immunity.

If, on the other hand, Petitioners are not seeking damages for violation of Department of Corrections regulations, it is not clear what *procedural* rights Petitioners are seeking to vindicate. Respondents admit that DANESE had a *substantive* right that the officers not be deliberately indifferent to his medical needs. That right exists independently of the Department of Corrections regulations. If Petitioners are claiming that the regulations required medical screening to detect suicidal tendencies, Petitioners are just plain wrong.[7] Even if the regulations did so provide, Petitioners never specify which procedural rights were violated.

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[7] The rule dealing with inmate health care is cast in discretionary terms and does not make *any* provisions regarding psychological screening or suicide prevention. Even the initial decision of whether to refer the inmate to a physician is discretionary. The only mention of suicide in the rules merely requires more frequent visual observation. No guidance is given as to how a suicidal individual is to be detected. The full text of the relevant rules is set forth below:

1979 A.C. R. 791 657

> Rule 657. (1) The administrator shall insure that appropriate medical screening and health care is provided to inmates. The administrator shall develop a plan for provision of medical and health services to inmates. The plan shall be available to the commission for inspection.
>
> (2) Upon admission, provision shall be made to detect symptoms of narcotic addiction, diabetes, epilepsy, heart disease, chemical impairment, and the like. Immediate attention shall be given to persons in a stupor or comatose state.
>
> (3) An inmate shall be examined by trained medical personnel within a reasonable period of time if an inmate is visibly ill, chronically ill, on medication, complains of illness, or whenever it is suspected that medical attention is necessary. The administrator may use either the inmate's personal physician or any trained medical person. The extent of the examination or the need for additional examinations shall be at the discretion of trained medical personnel."

(*concluded on page 17*)

Indeed, it is difficult to conceive of any sort of a hearing that could have been provided in these circumstances. If the police officers were deliberately indifferent to DANESE's medical needs, they would have violated his 14th Amendment rights whether or not they gave DANESE a hearing or followed any other sort of procedure. That is because the rights involved in this case are substantive and not procedural.

There are no procedural due process claims involved in this case as Petitioners are not seeking a hearing, nor do Petitioners claim that any procedural rights were violated. Violations of the Department of Corrections regulations are not relevant to either damages or immunity. The Sixth Circuit was correct in analyzing this case under substantive due process principles. Petitioners' procedural due process arguments have no merit and should be disregarded.

## II.

## THE SIXTH CIRCUIT WAS CORRECT IN FINDING THAT THE FOUR INDIVIDUAL POLICE OFFICERS WERE ENTITLED TO IMMUNITY.

The Sixth Circuit held that the four individual police officers were entitled to immunity. Officers GOWSOSKI,

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(*continued from page 16*)

1979 A.C., R. 791.635

"Rule 635. (1) Visual supervision of each inmate shall be provided at least once every 60 minutes on a 24-hour basis and in high-risk areas on a more frequent basis.

(2) Provision shall be made to provide close visual supervision for an inmate who is potentially suicidal, mentally ill, or demonstrates unusual or bizarre behavior.

(3) Inmates shall be accounted for regularly by actual physical count taken by a facility employee at each shift change and as necessary."

CHUCHRAN, CARDINAL and KENYON defer to the analysis of the majority opinion of the Sixth Circuit Court of Appeals on the issue of qualified immunity. That Court correctly applied *Harlow* v. *Fitzgerald*, 457 U.S. 800; 102 S.Ct. 2727; 73 L.Ed. 2d. 396 (1982) and *Anderson* v. *Creighton*, 483 U.S. 635; 107 S.Ct. 3034; 90 L.Ed. 2d. 523 (1983). Those cases hold that local government officials, including police officers, are immune from damage suits unless they violate clearly established legal principles of which they should have been aware. Further, the legal principles have to be particularized to the circumstances of the case. In light of this legal standard, it is clear that Officers GOWSOSKI, CHUCHRAN, CARDINAL and KENYON were immune from suit.

The only law that was clearly established at the time of DANESE's death was that the officers could not be deliberately indifferent to DANESE's medical needs. If he was bleeding, in pain, or if he requested medical assistance, the officers had a duty to initiate steps that would result in medical attention being provided. Arguably, the officers were not entitled to be deliberately indifferent had DANESE made an unequivocal threat to kill himself, and had he appeared ready to immediately carry out the threat. However, as indicated by the Sixth Circuit, there was no particularized duty to screen DANESE for medical or psychological problems that were not readily apparent to a reasonable observer. There was, certainly, no particularized duty that a police officer with a high school education accurately diagnose a potential suicide when this cannot even be done with any degree of reliability by trained psychiatrists.

The police reports[8] show the involvement of each of the individual officers. When the correct Constitutional

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[8] See Footnote 2, *supra*.

standards are applied, it is clear that all four of the officers are entitled to qualified immunity.

**OFFICER KENYON**

Officer KENYON never saw DANESE while he was alive. Officer KENYON was called in from road patrol to relieve the personnel in the Communications Room for lunch. Officer KENYON was called to the cellblock area to cut DANESE down. Apparently, Petitioner is claiming that Officer KENYON had a duty to administer CPR to DANESE after cutting him down. However, Officer KENYON was not the supervisor in charge and the Fire Department ambulance arrived within minutes.

There is nothing in the record to indicate that Officer KENYON had either the authority or the training to administer CPR. Officer KENYON is entitled to qualified immunity.

**OFFICERS GOWSOSKI AND CHUCHRAN**

Officers GOWSOSKI and CHUCHRAN first made contact with DANESE when they responded to a call of a car parked in the middle of a residential street. Officer CHUCHRAN awoke DANESE, pulled the car to the side of the road, put the keys on the floor of the automobile and advised DANESE not to drive.

Later that evening, the same officers encountered DANESE driving the automobile. After stopping the vehicle and performing certain roadside sobriety tests, DANESE was placed under arrest for operating a motor vehicle while under the influence of intoxicating liquor. The officers were present during the booking process which included the administration of a breath test.

Both officers indicated that DANESE appeared to be in good spirits and was joking with another arrestee.

DANESE, at that time, did not make any threats to kill himself. Quite the contrary, when the officers tried to take his boots away, DANESE indicated that he could not commit suicide with his boots and he did not intend to do that anyway.

After DANESE was booked, both officers went home, because it was the end of their shift. Neither had any further contact with DANESE.

Perhaps a clinical psychiatrist would have picked up clues that DANESE was contemplating suicide when he joked about taking away belts and shoelaces and made other comments about suicide. However, there is no legal precedent that requires a first line police officer to possess the training of a clinical psychiatrist. The conduct of DANESE was consistent with a sophisticated criminal suspect who had been in jail before and who was familiar with jail and arrest procedures. In light of DANESE's apparent good spirits and the lack of any overt threats, it would be reasonable for a police officer to assume that DANESE did not need immediate psychological treatment or special suicide prevention measures. Officers GOWSOSKI and CHUCHRAN are entitled to qualified immunity.

**OFFICER CARDINAL**

Officer CARDINAL was the breathalyzer operator and was also assigned desk duty which included answering the telephone and dispatching.

Officer CARDINAL administered the breathalyzer test and was present during part of the booking process. DANESE talked with Officer CARDINAL about being $13,000 in debt and told CARDINAL, "I wish I wasn't here." Officer CARDINAL offered some encouragement to DANESE and then went about his duties.

Officer CARDINAL had no further contact with DANESE until he heard someone yelling and making noise in the cell area. DANESE demanded a cigarette and said if he didn't get a cigarette, he was going to hang himself. Officer CARDINAL told DANESE that smoking was against the rules and told DANESE to go to sleep.

Officer CARDINAL reported the threat to his supervisor.

Officer CARDINAL was told by his supervisors to watch DANESE, which Officer CARDINAL attempted to do by using the TV monitor. While the monitor was functional, there were some problems with the picture.

While making a visual check of the cell area, Officer CARDINAL found DANESE hanging in his cell with a shirt tied around his neck. Officer CARDINAL alerted his supervisor and assisted in cutting DANESE down. Officer CARDINAL then left to call the ambulance. He also opened the doors of the the police station, so that the ambulance personnel could have access to the cell area.

The only additional evidence that distinguishes Officer CARDINAL from Officers GOWSOSKI and CHUCHRAN is that he heard the ambiguous threat that DANESE was going to hang himself if he did not get a cigarette. Officer CARDINAL did just exactly what a reasonable police officer could be expected to do under the circumstances; he reported the threat to his supervisor. There is no evidence that Officer CARDINAL had the authority to abandon his other duties and maintain continuous visual surveillance upon DANESE. Also, the threat could be interpreted as merely an attempt by the prisoner to manipulate the officer,so that the officer could be persuaded to violate the no-smoking regulation of the lockup.

Officer CARDINAL is entitled to qualified immunity.

In light of the relevant legal standards established by this Court and in view of the facts, as contained in the police reports, the Sixth Circuit Court of Appeals was clearly correct in finding that these four individual officers were entitled to qualified immunity.

## CONCLUSION AND PRAYER FOR RELIEF

There is no reason for this Court to review the decision of the Sixth Circuit. This case does not involve any novel issues of law that have not already been addressed by this Court. All of the lower courts who have considered the issue of jail suicide have applied the same legal test; namely, the deliberate indifference standard. Any perceived conflict amongst the lower court decisions would deal with the factual differences between the cases and not any disagreement as to the relevant law that applies. In fact, Petitioners' argument in this case really reduces to the argument that the Sixth Circuit erroneously construed the facts in a manner adverse to Petitioners. However, Petitioners' "facts," are not facts at all, but are mere arguments fabricated out of thin air. There is no need for this Court to review this case and Respondents GOWSOSKI, CHUCHRAN, CARDINAL and KENYON respectfully request that this Court not issue a Writ of Certiorari in this case.

Respectfully submitted,

LABARGE, DINNING & GREVE, P.C.

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